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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

A. P. W. PAPER COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General prays that a writ of certiorari be issued to review a decree of the Circuit Court of Appeals for the Second Circuit entered in this cause on June 5, 1945, which reversed an order of the Federal Trade Commission requiring the respondent to cease and desist from certain unfair or deceptive acts or practices, and remanded the cause to the Commission for further proceedings in conformity with the court's opinion.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 458–463) is reported in 149 F. 2d 424.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 5, 1945 (R. 464). The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act as amended, 52 Stat. 111, 15 U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 4 of the Act of January 5, 1905, as amended in 1910, which prohibits persons other than the American National Red Cross from using the words "Red Cross" or the sign of the Greek red cross but excludes from this prohibition those who had used these words or symbol prior to January 5, 1905, confers upon such prior users a right, excepted from the prohibitions of the Federal Trade Commission Act as amended, to employ these words and symbol as an unfair or deceptive act or practice in interstate commerce.

STATUTES INVOLVED

Section 5 (a) of the Federal Trade Commission Act of September 26, 1914, 38 Stat. 719, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45 (a), provides in part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Section 4 of the American National Red Cross Act of January 5, 1905, 33 Stat. 600, 36 U. S. C. A. 4 (and Historical Note), provides as follows:

> That from and after the passage of this Act it shall be unlawful for any person within the jurisdiction of the United States to falsely and fraudulently hold himself out as, or represent or pretend himself to be, a member of, or an agent for, the American National Red Cross, for the purpose of soliciting, collecting, or receiving money or material; or for any person to wear or display the sign of the Red Cross, or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of, or an agent for, the American National Red Cross. Nor shall it be lawful for any person or corporation, other than the Red Cross of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign or any insignia colored in imitation thereof for the purposes of trade or as an advertisement to induce the sale of any article whatsoever. If any person violates the provisions of this section, he shall be guilty of a misdemeanor and shall be liable to a fine of not less than one nor more than five hun-

> dred dollars, or imprisonment for a term not exceeding one year, or both, for each and every offense. The fine so collected shall be paid to the American National Red Cross.

The Act of June 23, 1910, 36 Stat. 604, 36 U. S. C. 4, amended the above section by (1) omitting the last sentence and (2) substituting the following for the second sentence:

> It shall be unlawful for any person, corporation, or association other than the American National Red Cross and its duly authorized employees and agents and the army and navy sanitary and hospital authorities of the United States for the purpose of trade or as an advertisement to induce the sale of any article whatsoever or for any business or charitable purpose to use within the territory of the United States of America and its exterior possessions the emblem of the Greek Red Cross on a white ground, or any sign or insignia made or colored in imitation thereof, or of the words "Red Cross" or "Geneva Cross" or any combination of these words: *Provided, however,* That no person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January fifth, nineteen hundred and five, shall be deemed forbidden by this Act to continue the use thereof for the same purpose and for the same class of goods.

STATEMENT

The Federal Trade Commission, after a hearing on a complaint which it had issued against respondent under Section 5 of the Federal Trade Commission Act, made findings of fact which the court below found to be sustained by the evidence (R. 459). Among the facts found by the Commission, the following are deemed pertinent:

Respondent, which distributes its products throughout the United States, manufactures various brands of toilet tissues and paper towels, including brands which it designates and widely advertises as "Red Cross Toilet Tissue" and "Red Cross Towels." On each package or roll the words "Red Cross" and the Greek red cross are prominently displayed.[1] The words and the cross are registered with the Patent Office as a trade-mark and the trade-mark has been used in marketing the toilet tissue since 1897 and in marketing the paper towels since 1933. (R. 39–40; Comm. Exs. 1–3, printed following R. 358.)

Respondent's use of the foregoing name and symbol tends to deceive a substantial part of the purchasing public and to induce the erroneous belief that the products in question are sponsored or approved by the American Red Cross, are used

[1] Examples of the rolls and packages were before the court below as original exhibits (Comm. Exs. 7–12, R. 359–360). The prominence given the Red Cross name and symbol is shown by two of respondent's advertisements (Comm. Exs. 4–5, printed following R. 358).

by that organization or manufactured according to its sanitary standards, or that it is financially interested in their sale (R. 46, 49).[2] The statement on the products that they are made by respondent does not serve to correct such misconception (R. 47).

The Commission's findings also give the history and background of the American National Red Cross organization and set forth the legislative provisions dealing with protection of the Red Cross name and symbol.

The organization known as the Red Cross had its origin in a treaty drafted at an international convention in Geneva, Switzerland, in 1864 (and ratified by the United States in 1882) to provide for aid to soldiers wounded in battle and for using in this connection a distinctive and uniform flag consisting of a red cross on a white background (R. 40–41, 42). Since 1881, when its predecessor was first incorporated under the laws of the District of Columbia, the American National Red Cross has used the words "Red Cross" and the Greek red cross on a white ground to identify its organization and activities (R. 43). It was incorporated by Act of Congress of June 6, 1900, 31 Stat. 277, and reincorporated by the American National Red Cross Act of January 5, 1905 (R. 42). The latter statute (36 U. S. C. 1–6, 8) defines the organization's purposes and powers, es-

[2] 15 witnesses so testified (R. 47).

tablishes the manner in which the members of its governing body shall be appointed, and authorizes it to use the Red Cross emblem adopted by the Geneva convention (R. 42–43).

Section 4 of the 1905 Act prohibited use of the Red Cross emblem for purposes of trade by anyone not then lawfully entitled to use it and made violation of the section a misdemeanor punishable by fine and imprisonment (R. 44). The Act of June 23, 1910, amended Section 4 by bringing within the prohibition use of the words "Red Cross" and use of the Red Cross name or symbol for any business or charitable purpose and, as in the earlier statute, exempted from the prohibition those whose use of the name or symbol antedated January 5, 1905 (R. 44–45).

The Commission concluded that the acts and practices of respondent constitute unfair and deceptive acts and practices in interstate commerce (R. 49–50) and the Commission issued an order prohibiting respondent from using the Red Cross symbol on its products and the words "Red Cross" to designate them (R. 52).

On respondent's petition to review the Commission's order, the court below held that the findings of the Commission were supported by evi-

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[5] Of the 18 members of this body, the President appoints six, of whom he designates one as chairman and names one each from the Departments of State, War, Navy, Treasury and Justice (R. 42).

dence and that its findings established practices which, apart from the effect of the Act of January 5, 1905, as amended, clearly fell within the prohibitions of the Federal Trade Commission Act. But the court, pointing out that Congress had excluded pre-1905 users from the prohibition against use of the Red Cross name and symbol embodied in the Red Cross statute, construed this legislation as conferring upon such prior users a right of continuing use which survived, and therefore limited, the subsequent Congressional condemnation by the Federal Trade Commission Act of unfair or deceptive acts or practices in interstate commerce. The court, attempting to reconcile this construction of the Red Cross statute with the Federal Trade Commission Act, concluded that the Commission was without power to forbid use of the Red Cross name or symbol to pre-1905 users but that the Commission was empowered to grant other appropriate relief against their use of the name or symbol "in a deceptive manner." The court accordingly reversed the Commission's order and remanded the case to the Commission for the entry of a new order conforming to the court's opinion." (R. 461.)

Judge Clark, dissenting from this holding, gave as grounds therefor that an exception from a broad regulatory statute was not to be implied merely because the prohibitions of a prior statute having a wholly different purpose—protecting

the interests of the organization incorporated as the American National Red Cross—were limited in scope (R. 462–463).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that the American Red Cross Act of January 5, 1905, as amended confers upon those who had used the words "Red Cross" and its symbol prior to January 5, 1905, a right of continuing use which prevails against the subsequent prohibition, by the Federal Trade Commission Act as amended, of unfair or deceptive acts or practices in interstate commerce.

(2) In holding that the Federal Trade Commission Act does not empower the Federal Trade Commission, in the case of a corporation which had used the words "Red Cross" and the Red Cross symbol prior to January 5, 1905, and which currently employed such words and symbol as unfair or deceptive acts or practices in interstate commerce, to grant relief against such unfair or deceptive acts or practices by forbidding use of the words "Red Cross" and its symbol.

(3) In reversing the order of the Federal Trade Commission.

REASONS FOR GRANTING THE WRIT

The Government submits that the decision of the court below is clearly erroneous. The sole purpose of Section 4 of the Red Cross statute is

to protect the interests of the organization incorporated as the American National Red Cross, by prohibiting others from using the Red Cross name and its emblem. The exclusion from this prohibition of those who, prior to enactment of this statute, had lawfully used the name or emblem represents a balancing of the equities of these prior users against the injury to the Red Cross organization through continuation of such use. Such exemption in no way indicates that Congress intended to grant to the prior users a special and continuing immunity from general regulatory legislation later adopted by Congress for the purpose of protecting the consuming public against deception.

Section 4 of the Red Cross statute absolutely prohibits, as to those to whom it applies, use of the words "Red Cross" and use of its emblem. The Federal Trade Commission Act, on the other hand, makes use of these words or emblem unlawful only when they are used as an unfair method of competition or an unfair or deceptive act or practice in commerce. Since the two statutes are divergent both in purpose and in their substantive provisions this is not a case, as the court below seemed to think that it was, where the provisions of two statutes will be in conflict unless the court reads into the later statute, by implication, an exception or exemption corresponding to that granted by the earlier statute.

A trade name which is misleading to purchasers does not, by reason of its long use, obtain immunity from the prohibitions of the Federal Trade Commission Act and the Commission may, in a proceeding under the Act, lawfully ban further use of such name.[4] And registration of a trademark with the United States Patent Office "does not prevent its use from falling within the prohibition of the Federal Trade Commission Act." *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 679, and cases cited. Congress, by the Trade Commission Act, therefore chose not to make long-continued prior use a ground for immunity from the Act's general prohibitions. It would certainly be anomalous if the rule should be otherwise only when the trade name or mark was one which Congress, legislating for a different purpose, had chosen to prohibit absolutely except as to certain users thereof. This, nevertheless, is the anomalous result of the decision of the court below.

The court seemed to attribute some significance to the failure of Congress to enact certain bills to amend Section 4 of the Red Cross statute so as to eliminate, or eliminate within given periods, the exemption from its prohibitions of pre-1905

[4] *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 79–80, 81–82; *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429, 431 (C. C. A. 4). The trade name in each of these cases had been used for more than 30 years.

users.[5] But the proposals to subject pre-1905 users to an absolute prohibition had, in addition to a different purpose (*supra*, pp. 8–9), a different scope than the prohibitions, based on the Commerce Clause, incorporated in the Federal Trade Commission Act. Whether use of the words "Red Cross" or its emblem in connection with a product violates the Federal Trade Commission Act will depend upon whether or not the use in the particular case has a tendency to deceive the public. Under these circumstances, the failure to enact the bills to amend Section 4 of the Red Cross statute has little significance. Cf. *Helvering* v. *Clifford*, 309 U. S. 331, 337–338; *Corn Products Refining Co.* v. *Federal Trade Commission*, No. 680, Oct. Term 1944, slip opinion pp. 7–8.

The meaning of the Federal Trade Commission Act, read in conjunction with the American National Red Cross Act, as applied to pre-1905 users of the Red Cross emblem and of the words "Red Cross" presents an important question of federal law which has not been but should be settled by this Court. The decision by this Court, if it grants certiorari, will govern the application of the Trade Commission Act to all such pre-1905 users of whom there are, according

[5] H. R. 14330, 65th Cong., 3d sess. (printed in hearings before House Committee on Foreign Affairs on H. R. 6911, 77th Cong., 2d sess., 371); H. R. 7420, 77th Cong., 2d sess.; S. 469, 78th Cong., 2d sess.

to the uncontradicted testimony, "literally hundreds" (R. 311). The question presented is important because it involves not only the interests of the general public which the Trade Commission Act is designed to promote but also the interests of an organization having so many of the characteristics of a public institution as the American National Red Cross, the good will and public esteem of which suffer, it must be assumed, when its emblem and name are commercially exploited.[6]

The importance of the question of federal law presented is not measurably affected by the fact that the decision below circumscribes the relief which the Commission may grant rather than denies to the Commission all power of relief. As long as respondent may continue to use its present name and trade-mark, the deception of those presently misled—the careless, ignorant, illiterate or foreign-born—cannot be materially curbed by an accompanying corrective statement such as the

[6] The prohibitions of Section 4 of the Red Cross statute amount to a declaration to this effect by Congress.

The same declaration has been made, in effect, by international treaty. See Chap. VIII, Art. 28, of the Red Cross convention of 1929, to which the United States became a party in 1932, quoted in H. Rep. 2054, 78th Cong., 2d sess., 5–6.

The American National Red Cross has advised the Government that it believes that the issue raised by the decision in this case is "one of importance to our Organization as well as a matter of substantial public interest."

court below permits the Commission to require. Furthermore, if, as we contend, the order entered in this case was within the limits of the Commission's statutory authority, it is for the Commission to determine what relief is appropriate or necessary, subject to correction by the courts only if its determination amounts to an abuse of discretion. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 81–82; *Herzfeld* v. *Federal Trade Commission*, 140 F. 2d 207, 208–209 (C. C. A. 2); *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 142 F. 2d 437, 441–442 (C. C. A. 2), certiorari denied, 323 U. S. 753.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

HAROLD JUDSON,
Acting Solicitor General.

AUGUST 1945.